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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JESSE DEAN NAVA,

Defendant and Appellant.

G050795

(Super. Ct. No. INF039323)

O P I N I O N

Appeal from a judgment of the Superior Court of Riverside County, James S. Hawkins, Judge. Affirmed as modified.

Arthur Martin, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Adrienne S. Denault, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Jesse Dean Nava was convicted of second degree murder for shooting and killing Bernardo Gouthier. His principal complaint on appeal is the court's decision to sentence him to the upper term of 10 years for a personal use of a firearm enhancement.

The facts of this case were hotly disputed at trial. The prosecution characterized the case as a murder for hire, while defendant argued he shot the victim during an attempt to recover the proceeds of a burglary he felt he was owed. Defendant argues that because the jury ultimately convicted him of second degree murder, we must only rely on facts that support his theory rather than the evidence set forth in the entire record. While we disagree with his contention, it matters little to our ultimate conclusion in this case. Even viewing the facts in the light most favorable to defendant, we conclude that the court did not abuse its discretion in sentencing defendant to the upper term.

Defendant also argues he should have been subject to a one-year enhancement, rather than a two-year enhancement, under Penal Code section 12022.<sup>1</sup> The Attorney General concurs, and so do we. We shall order the judgment amended accordingly.

## I

### FACTS

We summarize the facts from the record and as stated in the companion case, *People v. Reynolds* (Sept. 29, 2015, G048622) [nonpub. opn.].

“Pattison Hayton considered himself an investment banker. . . . He married Kathy Barr in 1988. . . . Barr said she only saw Hayton five to 10 days a month. [¶] In 1995, three months after her son was born,<sup>[2]</sup> Barr began an affair with Bernardo Gouthier. Gouthier was an art dealer. He lived near Hayton and Barr . . . . [¶] Hayton

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<sup>1</sup> Subsequent statutory references are to the Penal Code.

<sup>2</sup> The couple apparently had at least one older child.

found out about Barr and Gouthier's relationship. In December 1996, Hayton telephoned Gouthier, put Barr on the telephone with Gouthier, and told her to tell Gouthier to leave her alone. She did and then Hayton got on the phone with Gouthier. Hayton told Gouthier to leave Barr alone 'or you'll be dead.' [¶] Barr and Hayton separated in January 1997. Barr moved in with Gouthier part time around March 1997, and permanently in September 1997. Dissolution proceedings were 'ugly.'" (*People v. Reynolds, supra*, G048622.)

There was an incident where Barr went to the former family home, and Hayton became angry and violent as she was leaving the house carrying numerous items, including their baby and a painting of Gouthier's. (*People v. Reynolds, supra*, G048622.) "Hayton grabbed the painting from her, put his foot through it, and threw it at Barr, telling her to give it back to her 'effing boyfriend.' He pushed Barr and 'slamm[ed]' her into metal doors." (*Ibid.*) Hayton was arrested. There were numerous other violent incidents, including vehicles belonging to Barr and Gouthier being set on fire and arson at the office of Barr's divorce attorney. When Hayton learned that Barr and Gouthier along with the children were living very close by, he was furious. (*Ibid.*)

"On October 25, 1997, the last day of Gouthier's life, Barr spent the day with him. That evening she went to Palm Desert to have dinner with a couple of girlfriends. The children were with their father, Hayton." (*People v. Reynolds, supra*, G048622.) When Barr arrived home, "she noticed all the lights were on inside the house and the front door was wide open. Both were unusual." (*Ibid.*) Caretakers, who lived across the street, found Gouthier. "He had been shot four times and was dead." (*Ibid.*)

Meanwhile, according to defendant, in 1997, he was a 17-year-old drug dealer and user who had been arrested for numerous felonies. He was close friends with Michael Marohn (Michael) and Mario Gonzalez. Michael introduced him to his father, Tony Marohn (Marohn). Marohn and defendant became involved in a drug enterprise.

Defendant became aware that Jerry Reynolds, a dealer in stolen goods, was providing drug-related supplies to Marohn.

Reynolds also used his knowledge as an employee of a plumbing and heating company to arrange burglaries, and according to defendant, Marohn recruited defendant as an accomplice in the burglaries. Reynolds had also become what defendant characterizes as a “henchman” for Hayton, participating in various unsavory activities.

At some point, Reynolds, through his plumbing work, became aware that a woman with several valuable clown portrait paintings by Red Skelton lived in the same neighborhood as Gouthier and Barr. Reynolds apparently had a buyer (defendant claims this was Hayton) ready to purchase the paintings if he could steal them. Marohn recruited defendant to participate in the burglary.

Initially, they went to the wrong house. Marohn was subsequently arrested, and arranged for his son Michael to work with defendant to complete the theft.

Defendant later claimed he wanted to be sure there was actually a buyer, and went, with Michael, to an address Michael provided. This was actually Gouthier’s house, according to defendant, and they allegedly had a conversation about the paintings, although the person they spoke to (Gouthier) did not know who Marohn was and did not seem to know what defendant was talking about. Gouthier allegedly told them to come back when they had the paintings.

Defendant and Michael committed the burglary the next day, stealing 10 to 15 paintings, which they handed over to Reynolds. Reynolds told them they would be paid that day or the next.

The following day, defendant asserted he called Michael to ask about their payment for the burglary. Michael told him Reynolds was having trouble getting the money. Defendant told Michael they were not giving up the paintings for nothing. Michael said Reynolds had already taken the paintings to the buyer, the man they had seen several days earlier (Gouthier). Michael agreed to go with defendant to talk to the

buyer, who Reynolds claimed was a Brazilian gangster. Defendant asserted his intent was to get paid.

Defendant, carrying a gun as was his habit, went with Michael to Gonzalez's house. Gonzalez ultimately went with them, and switched guns with defendant. Eventually, Michael and defendant went in the house, and saw Gouthier. Defendant allegedly began yelling that Gouthier owed them money; Gouthier denied it. Defendant purportedly believed that, although armed, he and Michael were "little skinny kids" while Gouthier was a Brazilian mobster.

Defendant claimed he did not want to fight. He drew his gun and told Gouthier to get on the ground, and he was going to pay them. This, according to defendant, was to avoid a fight. Defendant claimed Gouthier eventually started to get up and came toward them, and Michael told him to shoot. Defendant claimed he "closed [his] eyes" and began firing until the gun stopped.

This version of events was completely different than the version the prosecution presented at trial, which involved a murder for hire plot by Hayton. For our purposes, however, it makes no difference. We also need not recount the lengthy investigation which was followed by several years as a cold case. We note the paintings were eventually recovered; some were at a property belonging to Reynolds, and the rest were at a storage unit rented to Hayton.

Defendant and Reynolds were ultimately charged with the murder of Gouthier. (§ 187, subd. (a).) The murder was alleged to have been committed for financial gain (§ 190.2, subd. (a)(1)). Defendant was alleged to have personally used a firearm in the commission of the murder and that he participated in the crime knowing another principal was armed with a firearm.<sup>3</sup> (§§ 12022.5, subd. (a), 12022.)

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<sup>3</sup> The second enhancement was incorrectly listed in the information and the verdict form, as violating section 12022, subdivision (d).

Defendant and Reynolds were both initially convicted of first degree murder. (*People v. Reynolds and Nava* (Jul. 16, 2009, G040063) [nonpub. opn.].) We reversed the convictions due to *Batson/Wheeler* error.<sup>4</sup>

After the retrial, both defendant and Reynolds were convicted of second degree murder. The jury also found both charged enhancements true as to defendant. The court sentenced defendant to 15 years to life for the murder, plus a consecutive 10 years for the personal use of a firearm enhancement. The court also imposed and stayed sentence on the section 12022 enhancement.

## II

### DISCUSSION

#### A. Upper Term on the Section 12022.5 Enhancement

We review sentencing decisions for abuse of discretion.<sup>5</sup> (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) “[A] trial court will abuse its discretion . . . if it relies upon circumstances that are not relevant to the decision or that otherwise constitute an improper basis for decision.” (*Ibid.*) “If an enhancement is punishable by one of three terms, the court must, in its discretion, impose the term that best serves the interest of justice and state the reasons for its sentence choice on the record at the time of sentencing.” (Cal. Rules of Court, rule 4.428; subsequent references to rules are to the California Rules of Court.)

Defendant’s primary contention is that since he was convicted of second, rather than first degree murder, the jury must have completely discounted the existence of a murder for hire plot and accepted his “little skinny kids” versus Brazilian mobster

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<sup>4</sup> See *Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258.

<sup>5</sup> The Attorney General argues this issue was waived, but we disagree. It was argued during sentencing and despite the lack of a specific objection after the court reached a ruling, the issue was properly raised and argued.

version of events. Therefore, he argues, the court could only consider his version when deciding on how to sentence him on the enhancement.

We disagree. As we discussed in the companion case: “We do not know why the jury acquitted defendant and Nava of first degree murder. For all we know, the jury concluded a conviction for first degree murder with the attached special circumstance allegation was too onerous and decided to show mercy to defendant and Nava, an act a jury has the power, but not the right to do. [Citation.] A jury has the “undisputed power” to acquit regardless of the evidence.’ [Citation.]” (*People v. Reynolds, supra*, G048622.)

Even if defendant were correct, we would find no abuse of discretion here. The court stated, in its tentative, that it was inclined to sentence to the upper term due to the “great violence and cruelty, vicious and callous [nature of the crime], planning, sophistication, professionalism, the attempt to take great money.”

Assuming we buy defendant’s version of events hook, line, and sinker, all of those factors are nonetheless present. No matter how much innocence and blame of others defendant tries to project, he admits he committed a burglary (in and of itself a dangerous act) with the intent to profit as much as he could. When he was not paid by his accomplice quickly enough, he decided to confront the purported buyer of this stolen property in order to acquire funds or property of “great monetary value.” (Rule 4.421 (a)(9).) This confrontation was at his urging, not his companion’s, and he went to the confrontation armed. He knew or should have known that confronting Gouthier armed was an inherently dangerous act. (Rule 4.421 (a)(1).) His claims that he did not want to fight are unavailing in light of his decision to carry a gun. The confrontation evidences “planning, sophistication, or professionalism” all of which are appropriate factors to consider when choosing an upper term. (Rule 4.421 (a)(8).) So is the “great violence” (rule 4.421 (a)(1)) of shooting at a person until the gun is empty, which is what happened according to defendant’s own testimony. Despite defendant’s assertions to the contrary,

his own claims about what happened permitted the trial court, in its discretion, to conclude this was “more egregious than the average murder by gun.” The entire situation was of defendant’s design and execution. The imposition of the upper term on the personal use enhancement was, accordingly, proper.

*B. The Section 12022 Enhancement*

Defendant argues he was erroneously charged with, and eventually convicted and sentenced for, a gun use enhancement under section 12022, subdivision (d). The amended information stated the enhancement applied because defendant “participated as a principal knowing that another principal in said offense was armed with a firearm.”

Subdivisions (c) and (d) of section 12022, however, apply only to certain drug crimes that are not at issue here. Defendant argues, and the Attorney General concurs, that he should have been subject to a one-year enhancement under section 12022, subdivision (a)(1), which states the enhancement “shall apply to a person who is a principal in the commission of a felony or attempted felony if one or more of the principals is armed with a firearm.”

We concur. Section 12022, subdivision (d), is clearly inapplicable; it appears the information included a typographical error which was repeated throughout the case. We shall therefore order the judgment amended to reflect a stayed one-year enhancement under section 12022, subdivision (a)(1).

III

DISPOSITION

The judgment is affirmed as modified. The clerk of the trial court is directed to prepare an amended abstract of judgment removing the reference to section 12022, subdivision (d), and reflecting a stayed one-year enhancement under section

12022, subdivision (a)(1). A copy of the amended abstract of judgment is to be forwarded to the Department of Corrections and Rehabilitation.

MOORE, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.